December 12, 2012

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REPORT AND DECISION

SUBJECT: Department of Permitting and Environmental Review File No. **E1000730**

LAKE WASHINGTON SCHOOL DISTRICT
Code Enforcement Appeal

Location: 22821 NE Redmond-Fall City Road

Appellant: Lake Washington School District
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SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Deny in part, grant in part, and continue proceeding

EXAMINER PROCEEDINGS

Hearing Opened:	December 6, 2012
Hearing Closed:	N/A

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the Hearing Examiner's Office. Having reviewed the record in this matter, the Examiner now makes and enters the following.

INTRODUCTION

1. This dispute involves a 3.19 acre parcel on NE Redmond-Fall City Road. The subject property is owned by the Lake Washington School District (District) and leased by Santa, Inc. (Santa), a trucking and excavation company.

2. The subject property (along with a parcel to the south) is an industrially-zone island within a generally RA-zoned area. Two twists on this exist. First, the adjacent establishments appear similar in scope and intensity to Santa. (Whether those uses on the adjacent, RA-zone parcels are actually legal is another question.) Second, the subject property has a "P-" zoning suffix to its industrial designation, and that P-suffix is the crux of the dispute.

3. After an anonymous citizen filed a code enforcement complaint, and after some preliminary wrangling, on August 1, 2012, the Department of Permitting and Environmental Review (DPER) issued a Notice and Order, finding two violations, (1) use of the property as a contractor's storage yard and storage rental facility in violation of the "P-" zoning suffix, and (2) inoperable vehicles and vehicle parts. The District timely appealed on August 15. We discuss these in turn.

FINDINGS AND CONCLUSIONS – P SUFFIX ZONING

4. The subject property, and adjacent property to the south, are zoned industrial. Prior to the hearing, Santa ceased its storage facility operations and certain other uses such that there was no dispute by the time of the hearing that Santa's current operations are generally consistent with "I" zoning. The question is only whether Santa's operations are consistent with the P-suffix attached to that industrial designation.

5. The original P-suffix required that "any redevelopment of this site shall be limited to pipeline utility and/or school bus base uses." The property owner to the south sought a conditional use permit and a rezone to add a cell tower. In recommending a rezone in 1996, the examiner mused that "it is not altogether clear that a rezone is actually required for approval of this monopole application." The Council subsequently approved the rezone, removing the "pipeline" limitation from the P-suffix.

6. DPER argues that Santa has changed the *use* away from the property's utility origins. DPER is correct that Santa's use is not the same use as a utility. P-suffixes or other zoning criteria often restrict the uses of a property. KCC 21A.38.020(A) specifically authorizes the County to "increase development standards or limit uses on specific properties" via P-suffixes. It would have been well within the Council's prerogative to have, either at the time of the original P-suffix or when that P-suffix was amended, write the P-suffix as "any redevelopment *or use* of this site shall be limited to utility and/or school bus base uses."

7. But the Council did not go that route. Instead, the particular P-suffix applies only to "any *redevelopment* of this site." And while "redevelopment" is not separately defined in Title 21A, the pertinent special district overlay provision states that "property-specific development standards adopted thereby shall apply to any development proposal on the

subject property subject to county review, including, but not limited to, a building permit, grading permit…[and] conditional use permit." KCC 21A.38.030(A).

8. Thus, the District's citation to the 1996 examiner decision is not persuasive, because the conditional use permit in dispute in that case explicitly qualified (or would qualify under the modern version of the code) as a "development proposal," triggering the P-suffix restriction. And DPER's assertion that the use has changed, although persuasive as a matter of fact, is of no legal import because the P-suffix limit is only geared to redevelopment activities, as defined by KCC 21A.38.030(A), not to other changes in use below the threshold for requiring a qualifying permit.

9. Although Santa has not applied to redevelop the property, the real question is whether Santa has undertaken activities requiring a permit application, thus triggering the "redevelopment proposal" language. It cannot be that a property owner requesting a permit triggers the P-suffix, while one illegally performing that work without a permit application does not. If Santa has undertaken activities that required a qualifying permit, it is "redeveloping" the property.

10. At the hearing, DPER opined that Santa's activities needed a grading permit, and pointed to aerial photos. Santa testified that it had done no such grading, and the District offered an alternative explanation for the difference in photos before and after Santa's occupation. The record is not sufficiently developed on that score.

11. Ordinarily, that would be the death knell for DPER's case – a failure of proof. But this is not the ordinary procedural posture where putative violations of the grading code arise. First, this is not a grading violation matter. DPER did its job correctly here, cabining its inquiry to the subject matter of the complaint, a complaint apparently not alleging a grading violation. Grading is now in play, but was not at the time DPER built its case.

12. Second, the argument that Santa's activities are legal because they have not "redeveloped" the property was not the District's original basis for appeal. Its statement of appeal argued that Santa's use was an "existing use, and for pipeline and other utilities," and that other tenants have used the property "under the current zoning for utilities," *i.e.* that the *use* has been and is consistent with the P-suffix's "utility" limitation, and is thus legal. The District wisely abandoned this argument at the hearing. Per our rules, the "identification of errors and reasons for reversal or modification contained in the statement of appeal shall define and limit the issues."

13. An examiner, however, can authorize an amendment. But if we allow the District to constructively amend its appeal and raise the "redevelopment" issue, then fairness dictates that DPER be given time and access to the property to effectively respond to the new defense. Thus, we authorize the District to raise the potentially winning "we-haven't-redeveloped" defense, contingent upon the District providing, by **December 21, 2012**, a written statement to DPER (with a copy to the Hearing Examiner) consenting to the entry of DPER employees onto the property to inspect the property for a potential grading violation.

14. If the District does not provide timely consent, we decide the issue per the errors/reasons for reversal identified in its statement of appeal. In that scenario, we conclude with little trouble that although Santa may do work for utilities, along with work for other clients,

its use of the property does not qualify under the P-suffix's "utility" limitation. DPER's Notice and Order regarding the P-suffix violation would be sustained.

15. If the District does timely consent, we will keep the record open until such time as DPER determines, based on its investigation, whether there has been grading-permit-triggering activity on the property. If DPER determines that sufficient proof exists, and that the public interests warrants pursuing the issue, we will hold an additional hearing to decide the grading issue. If DPER does not elect to pursue the matter, the appeal as to the P-suffix condition would be sustained.

16. We note that the remaining P-suffix issue is no longer a fundamental zoning code interpretation question, but simply a garden-variety grading dispute – the proverbial tail wagging the dog. Conceivably, once DPER inspects the site, even if it finds grading work over the permit threshold, it may identify other steps short of a formal grading application whereby the District could alleviate related concerns without triggering the P-suffix's "redevelopment" limitation. That is for the parties to decide, but we note that our only jurisdiction in this matter is the District's appeal, and that this does not appear to be a matter where the examiner has an independent duty (regardless of the desires of the parties) to render a second determination, at least barring something outlandish.

17. If we deny the current appeal, either because the District does not allow DPER's inspection (in which case the appeal is denied based on the four corners of the appeal statement), or DPER decides to proceed with – and is successful in – showing that Santa's actions triggered the need for a grading permit (and we eventually deny the appeal because Santa violated the P-suffix's limits to "redevelopment"), Santa's operations would be illegal. The question would become what the appropriate next step would be.

18. Exhibits and testimony at the hearing established that there was no life/safety issue or imminent threat posed by Santa's operation. In addition, the adjacent establishments appear similar in scope and intensity to Santa. Whether those uses on the adjacent, RA-zone parcels are actually legal is an open question. The District believed it knew who turned Santa in, and that the complainant was itself in violation. Photo evidence seemed to support this. One could easily see this area becoming a vicious cycle of neighbors turning in neighbors for code violations, if the conflict festers and complaints continue.

19. Although the appropriateness of a rezone would need to be determined based on a careful consideration of the facts and arguments in the appropriate setting, we see no reason why Santa should not be allowed to continue with its current operations, so long as the District diligently pursues a rezone. There are, after all, two ways a land use can become legal: the activity can conform to the law or the law can conform to the activity. Assuming the P-suffix is currently being violated, we will likely stay the force of that decision to allow the District time to seek a zoning amendment.

FINDINGS AND CONCLUSIONS – VEHICLE PARTS

20. Viewing DPER's original pictures, there may have initially been many violative items. But by the time of the hearing, Santa had removed much of the disputed materials, including inoperable vehicles. As we understood the testimony, the remaining dispute is a legal one involving two categories, the axles in Exhibit 12 and the tires in Exhibit 13.

21. Neither the remaining axles or the tires are "rubbish or junk," per KCC 21A.32.320(A), and DPER made it clear that was not arguing such. Instead, DPER points to subsection (C)'s prohibition against "dismantled or inoperative vehicles or remnant parts thereof," and KCC 23.10.040's prohibition against storing "wrecked, dismantled or inoperative vehicle, or part thereof."

22. As to various axles and parts in Exhibit 12, Santa explained how it uses those on different trucks, and we are sympathetic to the District's arguments. However, we find the statutory language ambiguous, and thus we must accord an agency interpretation "great deference." *Overlake Hosp. Ass'n v. Dept. of Health of State of Wash.*, 170 Wn.2d 43, 56, 239 P.3d 1095 (2010). DPER has been consistent in prohibiting outdoor storage of vehicle parts in such code enforcement cases, and the "particular deference" due a "longstanding" agency interpretation exists even in the absence of formal agency rulemaking. *Barnhart v. Walton*, 535 U.S. 212, 220 (2002). Thus, by law, DPER has to get the nod in interpreting "remnant parts" and "dismantled… vehicles… or part thereof"

23. Certainly a strong, contrary argument can be made, but we are especially reluctant to go there because it would give DPER unbridled discretion in choosing what used vehicle parts can remain uncovered and what cannot. In the majority of code enforcement cases the citizen keeps vehicle parts for a reason – they are or could in the right circumstance be useful. (If they were not, they would fall in the "rubbish or junk" category, which, as discussed above, is a different subspecies). Making the outcome turn on a piece-by-piece subjective call about the origin of a particular part invites arbitrary decision-making. Consistency, over the long haul, will likely lead to a more equitable outcome for County residents than trying to piecemeal each and every used vehicle part.

24. Thus, we uphold the Notice and Order as to the continuing outdoor storage of the various axles on the property. Per KCC 23.10.040(A), the axles will need to be enclosed in either a current building or in a new one. We note, to the extent it figures into the "redevelopment" question of the P-suffix discussion above, that, per KCC 16.02.240, buildings with a floor area not exceeding 200 square feet do not typically trigger the need for a building permit.

25. That deference does not extend to the tires in Exhibit 13. "Open storage of rubbish or junk including …tires" are specifically prohibited by KCC 21A.32.320(A). But, as discussed above, DPER recognized that the remaining tires are not rubbish or debris. Santa testified that the tires were *new* tires, explaining that the tire provider would bring new ones as it removed the spent ones Santa routinely took off its trucks. Exhibit 13 is consistent with that testimony. Whatever the "remnant parts" or "part thereof" language discussed above may mean, it cannot – without creating an absurd result we are cautioned to avoid, *In re Parentage of J.M.K.*, 155 Wn.2d 373, 387, 119 P.3d 840 (2005) – be read as targeting *new* tires, neatly stacked against a wall, as part of an ongoing business operation otherwise legal in an industrial zone. And the facts here are easily distinguishable from the usual code enforcement scenario involving used tires, meaning our ruling here does not invite standardless decision-making. The appeal is sustained with regard to the tires illustrated by Exhibit 13.

ORDER

26. The District's appeal as to violation one of the August 1, 2012, Notice and Order is conditionally GRANTED, if by **December 21, 2012**, the District and/or Santa provides a written statement to DPER (with a copy to the Hearing Examiner) consenting to the entry of DPER employees onto the property to inspect the property for a potential grading violation. Otherwise, the appeal is DENIED.

27. The District's appeal as to violation two of the August 1, 2012, Notice and Order is GRANTED as to the new tires in Exhibit 13 and DENIED as to the axles in Exhibit 12. By **March 12, 2013**, the axles shall be removed from the property or completely enclosed.

28. The record shall remain open, and we shall continue this case on call until one of the parties indicates it is ready to continue the hearing. Barring such a request or some other notification from a party, we will conduct a telephonic status conference on **March 13, 2012, at 10 a.m.** The examiner's office will originate the call. Unless a party objects, the deadlines for concluding this matter are waived until such time as a party requests subsequent examiner action.

ORDERED December 12, 2012.

David W. Spohr
Interim Deputy King County Hearing Examiner

NOTICE OF APPEAL

Pursuant to King County Code Chapter 20.24, the King County Council has directed that the Examiner make the final decision on behalf of the county regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are property commenced in King County Superior Court within 21 days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

dws/gao

MINUTES OF THE DECEMBER 6, 2012, PUBLIC HEARING ON PERMITTING AND ENVIRONMENTAL REVIEW FILE NO. E1000730.

David W Spohr was the Hearing Examiner in this matter. Jeri Breazeal participated in the hearing on behalf of the department, David A. Alskog on behalf of Lake Washington School District, Forrest Miller and Mick Santa.

The following Exhibits were offered and entered into the record:

Exhibit no. 1	Permitting and Environmental Review staff report to the Hearing Examiner for file no. E1000730.
Exhibit no. 2	Copy of the Notice and Order issued August 1, 2012
Exhibit no. 3	Copy of the Notice and Statement of Appeal received August 15, 2012
Exhibit no. 4	Copies of codes cited in the Notice and Order
Exhibit no. 5a	Photographs of property dated December 12, 2010
Exhibit no. 5b	Photographs of property dated April 20, 2012
Exhibit no. 5c	Photographs of property dated November 19, 2012
Exhibit no. 6	2008 Aerial of property
Exhibit no. 7	Copy of Santa Trucking and Excavation web site
Exhibit no. 8	Copy of Santa Trucking and Excavation's contractor's license
Exhibit no. 9	Copy of the ordinance amending the P suffix condition, the Hearing Examiner's report dated October 7, 1996 and the pertaining staff report for L96RZ003
Exhibit no. 10	Photographs showing tires and tire rims
Exhibit no. 11	Photograph of parking area on property
Exhibit no. 12	Photograph showing new axels Mr. Santa purchased
Exhibit no. 13	Photograph showing new tires with tags still on them
Exhibit no. 14	Photograph showing an existing building with a tower on the property
Exhibit no. 15	2012 aerial of view off of Redmond-Fall City Road
Exhibit no. 16	Photograph of Santa property to the west

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